

1705. January 10. MARGARET MENZIES *against* GILBERT LIVINGSTON.

GEORGE Livingston of Saltcoats being lately deceased, Gilbert Livingston, his cousin-german, and nearest agnate, takes brieves out of the Chancery for serving himself heir-male. Margaret Menzies, as sister's daughter to the said George, and heir of tailyie to him by a disposition, raises advocation of the brieves to the macers, and insisted on thir reasons:—*1mo*, That the bailies of Canongate, to whom the brieves were directed, were not competent judges, seeing his claim particularised the lands of Saltcoats, which lie in East Lothian, and not within the jurisdiction of the regality of the Canongate; and so the subject is *extra territorium*. *2do*, The contract of marriage in 1665, tailyeing thir lands to the heirs-male, was entered into when he was minor, and without his curators' consent; and so was *ipso jure* null; and could not alter the former destination of succession, which was *hæredibus quibuscunque*. *3tio*, There was intricacy, and an apparent controversy would arise upon this service: For Alexander Livingston, son to the tailyier, and elder brother to the laird who last deceased, broke the said tailyie, and entered as heir of line conform to the ancient rights and in-festments of the said estate; and so the tailyie to the heirs-male, *confusione*, became extinct.

ANSWERED to the *first*,—If there were any other heir-male competing, they might object it; but Margaret Menzies could never do it: and he behoved to mention the lands, because he came in as heir of provision, by virtue of the tailyie contained in the contract of marriage; and there is no more designed but a general service, to which the bailies of the Canongate are certainly competent. As to the *second*, *Esto* he had been minor when he entered into this contract, yet that is no reason of advocation, but a defence *in causa*, when all the competitors are in the field, and come to debate their interest; and then the validity of the contract will be debated. As to the *third*, *Esto* Alexander Livingston had been served heir of line without respect to the tailyie in his father's contract of marriage, yet that can never be a revocation of the tailyie; for, *1mo*, He was heir-male as well as of line, and so might enter by any of these titles centered in his person. *2do*, He was known to be fatuous, and no deed of his could alter the succession and destination settled by his father in his contract-matrimonial. *3tio*, This is *in causa*, and not *hujus loci*.

The Lords thought it more proper for the macers, to whom assessors might be named in a case of difficulty, and therefore advocated the brieves.

Besides thir two parties, there is likewise a third competitor, *viz.* a son of Alexander Aikenhead's, on a bond of tailyie and disposition, bearing a power to alter, and which, it is alleged, was accordingly revoked.

*Vol. II. Page 256.*

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1705. January 13. WEMYSS of UNTHANK *against* PATRICK DUNCAN and ANDREW BYRES.

SIR Alexander Erskine of Cambo, Lyon King at Arms, being debtor to Wemyss of Unthank, by a bond of 1000 merks; and he having raised caption

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